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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN DIEGO MARES, Defendant and Appellant.	B232948 (Los Angeles County Super. Ct. No. BA359769)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Juan Diego Mares appeals his conviction of three counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)),[1] with true findings that he personally used and discharged a firearm (§ 12022.53, subds. (b), (c)) arising out of dispute over the ownership of some hubcaps. He contends the trial court erred in failing to instruct on self-defense, and that insufficient evidence supports his conviction for two of the assault counts. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prosecution Case

Jose Cruz purchased hubcaps for his wife Roxana Melendez's Nissan Quest minivan sometime in early July 2009. While attaching the hubcaps to her car, he broke two of the pegs on the hubcaps. Melendez made daily visits to her mother who lived on 55th Street in the Pueblo del Rio Housing Project. Melendez's son Ivan sometimes stayed with Melendez's mother. On July 29, 2009, Melendez had driven in her minivan to visit her mother. She parked on the street, and left about 3:30 p.m.

On July 30, 2009, when he came home from work in the early morning, Cruz noticed that the hubcaps were missing. That morning, Melendez went to visit her mother and around 11:00 a.m. called Cruz to tell him that she saw her hubcaps on a neighbor's car. Her mother's neighbor Mr. Jose told her that he knew who had taken her hubcaps, and pointed out defendant's car. Melendez recognized the hubcaps immediately, and she called Cruz.

Cruz went to Melendez's mother's apartment and parked across the street on 55th Street. Melendez was waiting for him in the front yard. She pointed out defendant's car, an Acura, which was parked on 55th Street in front of the apartment building. A neighbor had told Melendez that defendant had taken the hubcaps from Melendez's van. Cruz recognized the hubcaps on defendant's Acura because of the broken pegs as belonging to his wife's car.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Cruz had seen defendant before in the area with other people; when Cruz saw him, defendant was talking and "making some type of signs with his hands." The neighborhood of the shooting has Florencia 13 gang members in the area. Defendant was a member of the Florencia 13 gang, and had tattoos of an "F" and a "13". Cruz had observed gang graffiti outside the apartment complex where Melendez's mother lived, but had not seen defendant paint any graffiti. Melendez had also seen defendant near her mother's apartment, and had seen the gang graffiti in the area.

Cruz went to defendant's apartment door. Defendant emerged, and asked what Cruz wanted in an angry tone. Cruz told defendant he wanted to speak about the hubcaps, and said, "those hubcaps are mine. And I need you to give them back to me. And let's just forget about this situation, about this problem because I don't want to have any problems. I just want you to give me back my hubcaps." Defendant responded, "'they are not yours.'" Cruz told defendant that he recognized the hubcaps. Defendant asserted that he had bought them himself from his "'homie.'" Defendant did not seem willing to discuss the matter, was very angry, and said, "'I don't give a fuck.'"

Cruz told defendant he was going to take the hubcaps, and walked towards defendant's car. Cruz used both hands to remove the hubcaps from the car, and walked towards his own car. Cruz heard a shot, and turned to see that defendant was pointing a short shotgun at him. Melendez saw defendant shoot at Cruz with a rifle after Cruz had taken the hubcaps, but defendant had not hit him.[2] Defendant was standing by his apartment door in the yard area, and said, "'If you take them, I'm going to fuck you up.'" Cruz went to his car and put the hubcaps in. Melendez heard defendant say he was going to have his "'gangbangers'" come after them.

Cruz got an unloaded BB gun out of his car because he saw that Cruz was young and thought the BB gun might intimidate him. Defendant lowered his gun, and took

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[2] On cross-examination, Melendez stated that she did not actually see defendant shoot at Cruz, but that she heard the shots and defendant was the only one there with a gun.

several steps to where Melendez was standing near a tree. Melendez saw defendant pointing the gun towards them. Cruz pointed the BB gun at defendant. Cruz hid behind the tree with Melendez because he was afraid defendant was going to shoot him.

Melendez told Cruz to put the BB gun away, and that she was going to call the police. After defendant fired the first shot at Cruz, Cruz left.

Melendez testified that Ivan came outside while defendant was firing the first shot. Ivan was standing in front of Melendez near the tree, trying to protect her. After Cruz left, while Melendez was on the phone calling 911, Ivan remained with her, and defendant shot at her and her son.[3] Melendez admitted that although she did not actually see defendant fire his rifle because she was not looking at defendant, she heard the shots and defendant "was the only one . . . there shooting."[4] Melendez told the 911 operator to listen to the gunfire. She was unable to recall how many shots defendant fired while she was on the phone, but he fired at least two. After defendant fired, Ivan said to defendant, "'why don't you come over here and fight instead?'"

A neighbor emerged from the side of the building where defendant lived, and said that defendant had bought the hubcaps at a swap meet.

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[3] Melendez testified: "Q[.] . . . [W]hen you called 911, how did you feel? [¶] A[.] Well, nervous. [¶] Q[.] What were you nervous about? [¶] A[.] Because [defendant] shot again. [¶] Q[.] Now, he shot again while you were on the phone? [¶] A[.] Yes. [¶] . . . [¶] Q[.] So [Cruz] drove off, and you stayed there with your mother and son and called 911, correct? [¶] A[.] Yes."

[4] Melendez's trial testimony on this point was as follows: "Q[.] . . . [¶] Now, when you were calling the police, you said that you heard [defendant] shooting again. What did he shoot at? [¶] A[.] I already told that I was calling the police, but he fired towards where we were. [¶] Q[.] 'We,' your son [Ivan] and you? [¶] A[.] Yes. [¶] Q[.] How do you know that if you did not see [defendant]? [¶] A[.] But he was the only one that was there and he had the shotgun." She further testified, "Q[.] And after Ivan got himself in between [you and defendant], were there any more shots? [¶] A[.] Yes, we were, the two of us, together. I was behind [Ivan]. [¶] Q[.] And how many shots [did you hear] after Ivan put himself between you and [defendant]? [¶] A[.] I don't know because I was on the phone. I just heard—I mean, I told you that I only heard the shots."

Cruz got in his car and drove around the block believing that if he left, there would be no more problem. When he returned, the police had arrived. He came back because he wanted to know what had happened to Melendez, and because he heard sirens and thought it would now be safe.

Cruz showed the police his BB gun, and police ascertained that it was not loaded. Cruz denied telling police that he took a BB gun along with him to Melendez's mother's house because defendant intimidated people in the neighborhood. Melendez showed police the hubcaps and the broken pegs.

Melendez had not seen defendant's car before that day, so she did not know whether it previously had hubcaps or not. Cruz admitted that the design of the hubcaps was popular and very common.

Police set up a perimeter with 50 or 60 police officers and used a loudspeaker to call for defendant to come out. Defendant came out and was arrested without incident. Police searched defendant's apartment with defendant's consent and found a rifle case. Defendant told police he had a rifle, but a friend had put it away. Police looked for evidence of shooting at the scene, but they did not find any bullet hits on the wall or any casings, and they did not perform a gunshot residue test on defendant.

2. Defense Case

Cruz told police that he brought the BB gun because defendant was a gang member. Cruz was tired of defendant intimidating people in the neighborhood, stealing from people, and vandalizing property. As he was driving away, Cruz saw defendant pointing the rifle at him and shoot.

Roberto Henriquez, a neighbor of defendant, witnessed the altercation between defendant and Cruz, Melendez, and Melendez's son Ivan. Henriquez saw Cruz take the BB gun out of the trunk of his car, and Henriquez saw defendant had a round, 12 inch wood or metal tube. Cruz pointed the gun at defendant. Melendez's son began to argue with defendant and told defendant he would beat him up. Henriquez denied seeing defendant with gang members.

Elvin Garcia, defendant's neighbor, was arriving home from school at approximately 11:00 a.m. on July 30, 2009. He saw defendant discussing something with a man and a woman at the door of defendant's apartment. The tone of the discussion was angry. Moments later, he saw the man who had been arguing with defendant behind a tree aiming a handgun at defendant. The man did not fire the weapon. Garcia saw the man put some hubcaps in the back seat of his car. Defendant did not do anything; Garcia did not hear any gunshots, and did not see defendant holding anything in his hands.

Defendant was charged in an information with three counts of attempted murder (§§ 667 & 187, subd. (a)) and three counts of assault with a firearm (§ 245, subd. (a)(2)). In connection with the attempted murder counts, it was alleged that defendant personally discharged a firearm (§ 12022.53, subd. (c)), and in connection with the assault counts, that defendant personally used a firearm (§ 12022.5). A gang allegation was made as to each count (§ 186.22, subd. (b)(1)(C)). The three attempted murder counts were dismissed pursuant to section 1385.

The jury convicted defendant of three counts of assault with a firearm and found true the firearm allegations. The jury found not true the gang allegation.

DISCUSSION

I. SELF-DEFENSE INSTRUCTION

Defendant argues that the trial court erred in failing to instruct on self-defense as an alternative defense theory. He argues the evidence supported the instruction because he could have retrieved his gun after Cruz got the BB gun from his car and stood behind the tree and pointed the weapon at defendant; Ivan's conduct in challenging defendant to a fight would have further supported the theory. Additionally, Cruz gave inconsistent statements to the police after the incident, claiming he took the BB gun with him because he knew defendant was a gang member and he was tired of defendant's intimidating behavior. Respondent argues the record does not establish that defendant was in imminent danger of being killed or suffering great bodily injury because there was no

evidence from which the jury could have inferred that Cruz pointed the BB gun at defendant and defendant responded by shooting at Cruz.

A. Factual Background

Defense counsel requested the court to instruct the jury with CALCRIM 3470 as an alternative theory of the defense.[5] The prosecution objected, stating that the defense witnesses's testimony was that Cruz pulled out a weapon first, yet defendant never exhibited a weapon or fired a shot; thus there was no act constituting self-defense. The court observed, "let's assume that [defendant] fired at [at least one of the victims] and then [Cruz] drove off. That's when, allegedly, [Cruz] went to get a rifle. [¶] And then—well, before [Cruz] drove off, he got a rifle, positioned himself behind a tree, and then [defendant] allegedly went out and, as [Cruz] was leaving, fired. So where is the self-defense in that?" Defense counsel responded that Cruz testified he got the BB gun out to intimidate defendant, which was an unreasonable response if Cruz had seen defendant with a gun. "The more credible testimony would be that before [defendant] even got ahold of whatever he got ahold of, [Cruz] went to his car, retrieved the gun, and pointed it at [defendant]. And at that time, if it happened that way, that's when [defendant] retrieved the rifle. And that's when . . . [defendant] may have shot at [Cruz]."

The prosecution responded that defense counsel's scenario was not the state of the evidence because there was no testimony supporting that order of events. The defense witnesses only testified that defendant did not use any force. If defendant's position was that he did not use any force, then the self-defense instruction would not apply. Defense

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[5] CALCRIM 3470 provides in relevant part, "Self-defense is a defense to [the crime charged]. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if: [¶] 1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] [third party]) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully]; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

counsel responded that from all the evidence presented the jury could infer that defendant retrieved a weapon in response to Cruz's conduct. The court agreed that a self-defense instruction could be supported circumstantially, as defendant was arguing, but that the question was whether there was substantial evidence of a defense, which if believed would be sufficient for a reasonable jury to find a reasonable doubt as to defendant's guilt. The court found that even accepting defendant's version of the facts, a self-defense instruction was not supported because there was no evidence defendant was in imminent danger.

B. Discussion

"[A] trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence." (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 640.) The trial court has a duty to instruct sua sponte regarding a defense """if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."""" (*People v. Maury* (2003) 30 Cal.4th 342, 424.) If the defendant requests an instruction, the trial court must give it if it is supported by substantial evidence, even if it is inconsistent with another defense advanced by the defendant. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Elize* (1999) 71 Cal.App.4th 605, 615 (*Elize*).)

Self-defense against an assault requires an actual and reasonable belief in the need to defend against an imminent danger of bodily injury. (*People v. Humphr*ey (1996) 13 Cal.4th 1073, 1082; *People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.) The trier of fact "must consider what 'would appear to be necessary to a reasonable person'" in the position of defendant, with the defendant's knowledge and awareness. (*Humphrey*, at pp. 1082–1083.)

Here, the evidence supported two scenarios: First, according to defendant's witnesses, the facts could establish that defendant did not possess a weapon and never fired a shot, Cruz went to defendant's apartment armed with a BB gun to demand the

hubcaps back, and retreated behind a tree and pulled out the BB gun and aimed it at defendant. Second, according to the prosecution witnesses, the facts could establish that after Cruz took the hubcaps, defendant pulled out a gun and began to fire at Cruz; and then after Cruz took out the BB gun and left, defendant fired several more shots at Melendez and her son Ivan. Neither scenario supports a self-defense instruction. The first scenario would establish that defendant did not commit an assault. The second scenario would establish that defendant was the aggressor because he fired the first shot when Cruz's back was turned, and fired additional shots at unarmed victims (Melendez and her son Ivan). These facts establish that at no time when he fired the shots was defendant in imminent danger of being killed or seriously injured. Thus, the court correctly declined the instruction.

Nonetheless, defendant seeks to create an alternative factual scenario whereby Cruz approached with the BB gun and defendant took out the rifle to defend himself—although no witness testified to such facts—and claims that his case is similar to *Elize*, *supra*, 71 Cal.App.4th 605. In *Elize*, an uninvolved witness saw an armed security guard at a food market struggling with two women. (*Id*. at p. 607.) The defendant testified that the two women, both of whom were romantically involved with him, attacked him with iron pipes. The defendant claimed one of the women grabbed his handgun from its holster, and he grabbed her hand and tried to point the gun upward. The gun fired, and the two women left. (*Id*. at p. 609.) Evidence showed that a bullet entered and passed through the loose shirt of one of the women. (*Id* at pp. 607, 608.) One of the women testified that the defendant choked the other woman. (*Id*. at p. 608.) Defendant asked for self-defense instructions even though there had been no testimony from the defendant that he acted in self-defense, but defense counsel pointed out that the defendant suffered a broken arm and said he was hit by a pole. The trial court denied the request because the defendant had testified that the gun fired accidentally, and there was therefore no factual basis for self-defense instructions. (*Id*. at p. 610.)

Elize, *supra*, 71 Cal.App.4th 605 found that the trial court erred in refusing the instructions, noting that a jury could disbelieve the defendant's testimony that the firing was accidental and decide instead that he had fired intentionally, in which case a self-defense instruction would have been applicable. (*Id.* at p. 610.) In convicting him of assault with a firearm, the jury demonstrated it did disbelieve his testimony on this point, but having apparently determined that the firing was intentional and having no instruction regarding self-defense, the jury was deprived of any alternative to conviction. (*Ibid.*) *Elize* concluded that "[i]t is clear that inconsistency between an instruction and a defendant's testimony is no reason to refuse an instruction, so long as substantial evidence supports the instruction . . . . " (*Id*. at p. 612.) The court stated that with both lesser included offenses and defenses such as self-defense, when an instruction is requested, the court should give the instruction if the record contains substantial evidence. (*Id*. at p. 615.)

Here, however, defendant's case is distinguishable. In *Elize*, the evidence supported the conclusion there was a struggle between the defendant and the two victims and that the defendant fired his gun; these facts supported two theories: First, the gun went off accidentally, in which case the defendant was not guilty, or second, that he had fired intentionally in self-defense to get the women to stop their attack on him. Thus, in *Elize*, the facts supported two different scenarios. In the instant case, however, the evidence presented did not support defendant's factual scenario and thus a self-defense instruction was not required because no substantial evidence supported it. Specifically, defendant adduced evidence through witnesses that he did not have a gun and did not shoot a gun. Thus, under his defense, there was no act that could be construed as an act of self-defense. On the other hand, the evidence adduced by the prosecution witnesses indicated that defendant shot without being in imminent danger.

II. SUFFICIENCY OF THE EVIDENCE SUPPORTING ASSAULT

Defendant contends trial court erred in denying his section 1118.1 motion to dismiss, arguing that there was insufficient evidence that Melendez or her son Ivan were

victims of any assault: the evidence did not establish he fired a firearm in the direction of these two victims; as a result, there is no evidence he did an act that by its nature would directly and probably result in the application of force, or that he had the ability to apply such force. Respondent contends that the evidence supports the jury's conclusion that defendant shot at Melendez and Ivan because Melendez testified when she called the 911 operator, she stated to the operator that defendant was shooting at them, and Ivan said to defendant that instead of shooting at them, defendant should fight them.

A. Factual Background

At trial, defendant moved to dismiss the assault counts against victims Melendez and her son Ivan. With respect to Ivan, he argued there was no evidence Ivan felt he was assaulted or shot at. Further, Melendez never saw defendant because she was talking on the phone. The court denied the motion, finding that the jury could infer that the shots fired were aimed at Melendez and Ivan.

B. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Reversal on [sufficiency of the evidence] ground[s] is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*Ibid.*)

Substantial evidence in this context means "evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.) "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to

the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*Ibid*.) We resolve "all conflicts in [the] evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence." (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

C. Assault with a Firearm

Section 245, subdivision (a)(2) provides in relevant part, "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison . . . ." Assault is defined in section 240 as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." "An assault occurs whenever '"[t]he next movement would, at least to all appearance, complete the battery."' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 786, italics omitted.) Furthermore, "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) Accordingly, an assault occurs when a perpetrator menaces his victim with a firearm, even if he does not point the firearm directly at the victim. (See, e.g., *People v. McMakin* (1857) 8 Cal. 547, 548–549; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263–264.) Moreover, pointing a firearm toward a group of people may perpetrate an assault against each member of the group, even if the perpetrator subjectively intended to target only a single victim. (*People v. Bland* (2002) 28 Cal.4th 313, 329; *Raviart*, at p. 267.) "In reviewing a jury's determination, we view the whole record in a light most favorable to the verdict, drawing all reasonable

inferences and resolving all conflicts in support of the jury's verdict. [Citation.] We must uphold the verdict unless it clearly appears that upon no hypothesis whatever is there sufficient evidence to support it." (*People v Massie* (2006) 142 Cal.App.4th 365, 371.)

Here, the prosecution's theory was that defendant assaulted Melendez and her son when he fired additional shots (after Cruz had left the scene) at Melendez and her son Ivan as they stood near the tree. However, defendant asserts that evidence defendant fired shots in their direction was missing: The police found no cartridges, no evidence the bullets struck an object, and no weapon. Instead, defendant argues, the only evidence defendant shot at them came from Melendez, who testified that while she was dialing 911, she heard shots while she was on the telephone; however, she did not testify that she saw defendant shoot at them, or that she ran or tried to hide from the gunfire.

We disagree. Melendez testified that defendant shot at Cruz; after Cruz left, she saw defendant point the rifle at her and her son Ivan when she was beside the tree; while she was standing with Ivan near her, as she called 911, she heard shots being fired; and Ivan's statement supports an inference that defendant was wielding a gun that Ivan saw. Therefore, although Melendez never testified that she saw defendant actually shoot at her, her testimony supports inferences that after defendant shot at Cruz and Cruz left, defendant turned his weapon in her direction and intimidated her and Ivan with further gunfire. Melendez and Ivan were standing close together near the tree; thus, the assault on Melendez also constituted an assault against Ivan even if defendant intended only to target Melendez with his rifle. (*People v. Raviart*, *supra*, 93 Cal.App.4th at pp. 263–267.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.